

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLAUDIO LAVEZZARE,

Plaintiff,

- against -

FIRST HUNGARIAN CONGREGATION
OHAB ZEDEK,

Defendant.

07 CV 3542 (LAK)

ECF Case

**DEFENDANT'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO DISMISS**

On the Brief
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**DEFENDANT'S MEMORANDUM OF LAW IN
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PRELIMINARY STATEMENT

Plaintiff, Claudio Lavezzare (hereinafter "Plaintiff" or "employee") alleges that Defendant violated his rights under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216 et. seq. and the New York State Labor Law § 650 et. seq. Specifically, in his three Causes of Action, Plaintiff asserts claims for (1) overtime wages under the FLSA; (2) overtime wages under the New York State Labor Law; and (3) for violation of the spread of hours wage order of the New York Commissioner of Labor.

Defendant now moves pursuant to F.R.C.P. Rule 12 (b) (6) to dismiss Plaintiff's claim in count one inasmuch as the Fair Labor Standards Act does not apply to Plaintiff's claims and therefore this Court has no jurisdiction over Plaintiff's claims. Similarly, inasmuch as the same analysis applies to Plaintiff's state law claims, the same must also be dismissed.

Alternatively, should this Court determine that it does have jurisdiction, and the claims should not be dismissed, then Plaintiff seeks dismissal of Plaintiffs FLSA claims for damages allegedly accruing prior to May 3, 2005 and for New York Labor Law claims accruing prior to May 3, 2001. The statute of limitations for FLSA claims is two years (or three years if the violations are found to be willful), and each claim accrues when the wages allegedly owed were not paid. The statute of limitations under claims for the New York Labor Law is six years and each claim accrues when the wages allegedly owed were not paid. Thus, any claims for damages under the FLSA prior to two years from the filing of the complaint must be dismissed and any claims under the New York State Labor Law for claims accrued prior to May 3, 2001 must similarly be dismissed.

STATEMENT OF RELEVANT FACTS

The allegations of Plaintiff relevant to this instant motion can be briefly stated. Plaintiff asserts that he was employed by Defendant since 1999 (complaint ¶ 7). Plaintiff claims that he was denied overtime pay for most or all of his employment (complaint ¶'s 18, 23 and 28). Finally, Plaintiff recklessly alleges that Defendant constitutes a business enterprise for purposes of coverage under the FLSA (complaint ¶ 13).

Assuming for purposes of this motion, arguendo, that these allegations are factually accurate, Plaintiff's claims must nonetheless be dismissed, for the reasons set forth in detail below.

ARGUMENT

POINT I

APPLICABLE LEGAL STANDARDS FOR A MOTION TO DISMISS

In deciding a motion to dismiss under F.R.C.P. 12(b) (6), this Court must accept as true, all well pleaded factual allegations in the Complaint and view them in the light most favorable to the Plaintiff, drawing all reasonable inferences in his favor. However, the Court need not accept as true, conclusory allegations unsupported by factual assertions made by a claimant. DeJesus v. Sears, Roebuck & Co., 87 F.3d 65, (2nd Cir. 1996). See also, Lesavoy v. Lane, 304 F.Supp.2d 520, 527 (S.D.N.Y. 2004) ("we do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manor").

Here, Plaintiff claims, in a wholly conclusory manner, that he is entitled to the protections of the FSLA and similarly that such claims cover the duration of his employment. However, as explained below, the FLSA does not apply and, even if it did, the majority of Plaintiff's claims are time bared.